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SUPREME COURT, U. S.

MOTION FILED JUN 9 1958

In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 846

THOMAS GUY BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR RE-HEARING

GEORGE S. McCARTHY,
Fisk Building,
Amarillo, Texas,
Attorney for Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR RE-HEARING

Petitioner moves the Court to grant leave to file Petition for Re-Hearing herein, and for cause would show:

On May 22, 1958, Petitioner mailed to the Clerk of the Supreme Court by air mail forty (40) copies of the attached Motion for Re-Hearing. The Petition was properly addressed and postage paid. The established air mail schedule, the advice of local postal authorities, and prior experience assured Petitioner that the Petition for Re-Hearing would arrive in Washington the following morning and be delivered on May 23, 1958, the 25th day for filing the Petition. However, a delay in the United States mail caused the Petition to be delivered to the Clerk on the 24th day of May.

WHEREFORE, Petitioner prays the Court grant him leave to file the following Petition for Re-Hearing of Order Denying Petition for Writ of Certiorari.

Respectfully submitted,

GEORGE S. MCCARTHY,
Fisk Building,
Amarillo, Texas,
Attorney for Petitioner.

BEN MONNING, JR.
1016 Fisk Building,
Amarillo, Texas.
Of Counsel

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PETITION FOR RE-HEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

GEORGE S. McCARTHY,
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UNITED STATES OF AMERICA,

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PETITION FOR RE-HEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant re-hearing of its order of April 28, 1958, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above entitled case, as prayed for in the petition filed on March 10, 1958, herein.

REASONS FOR GRANTING THE RE-HEARING AND ISSUING THE WRIT

Section 353(b)(1) provides that prescription drugs

> "shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, (ii) upon an oral prescription by such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such written or oral prescription, if such refilling is authorized by the prescriber, . . . The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale."

No provision is made in the statute excepting or exempting the act of a licensed physician who dispenses without (i) a written prescription or (ii) an oral prescription later reduced to writing and filed by the pharmacist. Thus, if the section prohibits the act of petitioner in dispensing the drugs, then the Act also prohibits the dispensing of drugs in any quantity by any physician who does not comply with one of the three requirements. The Government contends that each such act of a physician constitutes a violation of the provision. The petitioner, who stands convicted of dispensing 1,000 tablets on three separate occasions, insists the statute is not applicable to the act of a licensed physician. In addition to the **Archambault** case, 224 Fed 2d 925, and **U. S. v. Ten Cartons,** 152 Fed Supl 360, considered by the Court in the petition, petitioner respectfully calls the attention of this Court to the fact that it denied petition for certiorari in **United States v. 2600 State Stores,** 235 Fed 2d 913, in which the Court of Appeals for the Seventh Circuit stated,

> "Another factor which we must consider in the instant case is the fact that the provisions of

> the sections of the Act here under consideration were to bind pharmacists and to subject them to penalties in case of violation."

By the denial petitioner insists that this Court has already approved the holding that the Act of October 26, 1951, the very section involved in this action, has already been interpreted to apply only to pharmacists, and that interpretation has the approval of this Court.

Petitioner failed to call to the attention of this Court the following rule of law applicable to the section here involved:

> "The Legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct, and know what act it is his duty to avoid. . . . If a statute uses words of no determinative meaning and the language is so general and indefinite as to embrace not only acts properly and legally punishable, but others not punishable, it will be declared void for uncertainty. It is axiomatic that statutes creating and defining crimes cannot be extended by intendment. Purely statutory offenses cannot be established by implication. There can be no constructive offenses. Before a man can be punished, his case must be plainly and unmistakably within a statute. A statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application lacks

the first essential of due process of law." 14 Am Jur 773.

Petitioner does not contend that the handling of 3,000 tablets, as found by the jury was not wrong. Petitioner does, however, re-urge that a licensed physician's act of administering or dispensing prescription drugs without compliance with sub-sections (i), (ii) and (iii) is permitted by Section 353(b)(1) of the Pure Food and Drug Act.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that re-hearing be granted and that, upon such re-hearing, a writ of certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

GEORGE S. MCCARTHY,

Fisk Building,
Amarillo, Texas,
Attorney for Petitioner.

BEN MONNING, JR.
1016 Fisk Building,
Amarillo, Texas.
Of Counsel

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Re-Hearing is presented in good faith, and not for delay, and is restricted to grounds specified in Rule 33 of the Rules of this Court.

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GEORGE S. MCCARTHY